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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PEDRO SOTO-TOVAR, Defendant.	Case No. 08MJ0228-BLM **UNITED STATES' MEMORANDUM REGARDING BURDEN OF ESTABLISHING DEFENDANT'S AGE** Date: January 29, 2008 Time: 3:00 p.m. Judge: Honorable Barbara L. Major

I

INTRODUCTION

Defendant Pedro Soto-Tovar is charged with transportation of illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). At defendant's initial appearance on January 28, 2008, defense counsel asserted that defendant is a juvenile. The Court set a further hearing on January 29, 2008 at 3:00 p.m. The Court requested that the Government provide its position on the burden of proof with respect to a defendant's claim of juvenile status. The following discussion addresses this issue.

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II

DISCUSSION

Although the Ninth Circuit Court of Appeals has never addressed the precise procedural rules governing a determination of juvenile status, other courts have. Initially, the Government must offer prima facie evidence of a defendant's adult status to the court. See United States v. Salgado-Ocampo, 50 F. Supp. 2d 908, 909 (D. Minn. 1999). After the Government meets this requirement, however, the burden shifts to the defendant to provide evidence of his juvenile status. Id. The Government has the opportunity to rebut with any additional information. Id.; see also United States v. Alvarez-Porras, 643 F.2d 54, 66 (2d Cir. 1981). "After receiving such evidence, the court must determine from the preponderance of the evidence the date on which defendant was born." Id.

Under the foregoing authorities, where the Government offers prima facie evidence that the defendant is an adult, the burden rests with the defendant to prove his juvenile status unless the defendant offers "verifiable personal data" establishing his age. Alvarez-Porras, 643 F.2d at 66; Salgado-Ocampo, 50 F. Supp. 2d at 909 ("When there is a reasonable basis for believing a defendant to be an adult, and the State has no means of verifying his claims, the defendant has the burden of proving his minority.") (citing State v. Sandomingo, 39 Wash. App. 709, 695 P.2d 592, 594 (1985)). Indeed, the Ninth Circuit has recognized that "[t]he age of the accused ... is a fact which at times may be peculiarly within the knowledge of the accused and sometimes, perhaps often, not susceptible to independent proof. Especially is this so where the accused is an alien." United States v. Frasquillo-Zomosa, 626 F.2d 99, 102 (9th Cir. 1980) (holding that defendant's age is not an element of the offense which the Government has the burden to prove beyond a reasonable doubt). Simply put, "even though age is pertinent to the treatment the defendant receives during prosecution and after a conviction, if any, the Constitution is not offended by requiring the defendant to come forward with credible evidence of his minority." Alvarez-Porras, 643 F.3d at 67.

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IV

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court adopt the approach indicated by the foregoing authorities in evaluating defendant's claim of juvenile status.

DATED: January 29, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ Joseph J.M. Orabona
JOSEPH J.M. ORABONA
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PEDRO SOTO-TOVAR, Defendant.	)	Case No. 08MJ0228-BLM **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, Joseph J.M. Orabona, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the **United States' Memorandum Regarding Burden of Establishing Defendant's Age**, dated January 29, 2008, and this Certificate of Service, dated January 29, 2008, on the following parties by facsimile and by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

1. John Ellis, Esq.
   Federal Defenders of San Diego, Inc.
   225 Broadway, Suite 900
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   Tel: (619) 234-8467
   Email: john_ellis@fd.org
   Lead Attorney for Defendant

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 29, 2008

/s/ *Joseph J.M. Orabona*
JOSEPH J.M. ORABONA
Assistant United States Attorney